STATE OF MICHIGAN

IN THE SUPREME COURT

HERALD COMPANY, INC. d/b/a
BOOTH NEWSPAPERS, INC. and
THE ANN ARBOR NEWS,

Plaintiff-Appellant,

v

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS,

Defendant-Appellee.

SUPREME COURT NO. 128263

Court of Appeals No. 254712

Washtenaw County Circuit Court
Case No. GC-W-04-0000117-CZ

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BRIEF OF AMICUS CURIAE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals apply the appropriate standard of review of the trial court's decision affirming the denial of disclosure of the vice president's advisory opinion?

   Plaintiff-Appellant answered "No".
   Defendant-Appellee answered "Yes".
   The Court of Appeals' Majority answered "Yes".
   The Court of Appeals' Minority answered "No".
   Amicus Curiae Michigan Townships Association answers "Yes".

2. Did the trial court clearly error in applying the Section 13(1)(m) "Frank Communication Exemption" in the FOIA (MCL 15.243(1)(m)).

   Plaintiff-Appellant answered "Yes".
   Defendant-Appellee answered "No".
   The Court of Appeals' Majority answered "No".
   The Court of Appeals' Minority answered "Yes".
   Amicus Curiae Michigan Townships Association answers "No".

3. Was the denial of disclosure of the vice president's communication which contained other than purely factual material within the scope of the FOIA exemption, including minimal interwoven facts which could not easily be extracted from non-factual opinion?

   Plaintiff-Appellant answered "No".
   Defendant-Appellee answered "Yes".
   The Court of Appeals' Majority answered "Yes".
   The Court of Appeals' Minority answered "No".
   Amicus Curiae Michigan Townships Association answers "Yes".

STATEMENT OF FACTS

Amicus Curiae Michigan Townships Association hereby incorporates by reference the Counter-Statement of Fact and Introduction contained in Defendant-Appellee's Eastern Michigan University Board of Regents Brief in Opposition to Plaintiff-Appellant Herald Company's Application for leave to appeal filed April 12, 2005.

The salient facts of the within cause for Supreme Court review in summary form are submitted as follows:

As a result of allegations of improper expenditures for the construction of the president's home on the university campus, the university's Board of Regents determined to investigate the allegations. It retained the accounting firm of Deloitte to perform an audit report concerning the expenditures for the president's home which was exhaustive and voluminous. This report was made public. In addition, a Board of Regent's member, Jan Brandon, requested an opinion from Vice President Doyle concerning these expenditures. In response, Vice President Doyle submitted a three page letter to Regent Brandon indicating his opinion on the expenditures. Apparently, this opinion contained a few facts which the circuit court, after an in-camera review of the letter, determined were minimal and could not easily be separated from Mr. Doyle's opinion for public release under the Freedom of Information Act request of Plaintiff Herald Company, Inc. The University declined to release the Doyle letter to the Plaintiff Newspaper on the basis of its exemption under the Freedom of Information Act as an internal frank communication of an advisory nature covering other than purely factual materials and submitted

preliminary to a final determination of policy or action by the Board of Regents under MCL 15.243(1)(m).

The respective arguments under this exemption provision are whether the public interest in encouraging frank communications between officials of public bodies clearly outweigh the public interest in disclosure of such communications; and whether the opinions of the vice president could be redacted from the communication to allow disclosure of the interwoven facts in the communication.

After the in-camera review of the subject letter/communication, both the trial judge and the two-judge majority in the Court of Appeals affirmed the denial of the disclosure of the communication. The Plaintiff's appeal to the Supreme Court followed.

In the Supreme Court's grant of leave to appeal, it requested the parties to, among other issues, submit briefs on: (1) whether the Court of Appeals correctly applied the appropriate standard of review; (2) whether the Washtenaw Circuit Court clearly erred in applying the Section 13(1)(m) Freedom of Information Act exemption, MCL 15.243(1)(m), to the public record in question; and (3) whether purely factual materials, if any, contained within the public record were properly included within the scope of the exemption.

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ARGUMENT

A. THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW OF THE TRIAL COURT'S DECISION AFFIRMING THE DENIAL OF DISCLOSURE OF THE VICE PRESIDENT'S ADVISORY OPINION TO A MEMBER OF THE UNIVERSITY BOARD OF REGENTS.

1. Standards of Appellate review are either de novo on interpretation of statutes or review of summary disposition decisions or on the basis of a clear error or abuse of discretion with respect to discretionary type decisions. As the court stated in Federated Publications, Inc., v Lansing, 467 Mich 98, at 106,

> "Although the FOIA expressly addresses the standard that governs a circuit court's review of a public body's own determination of what public records must be disclosed, it is silent regarding the standard that governs appellate review of the circuit's court decision. Therefore, we turn to our case law to determine the appropriate standard of review. As stated above, questions of law are reviewed de novo. Factual findings and matters of discretion, on the other hand, are generally reviewed either for clear error or an abuse of discretion. . . .
> "Several statutory exemptions exist in the FOIA. Depending on the particular language of an exemption, judicial determinations of its applicability may implicate different standards of Appellant review. We hold that the application of exemptions involving legal determinations are reviewed under a de novo standard. . . . Exemptions involving discretionary determinations, such as application of the instant exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a differential standard. We therefore hold that the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is 'clearly erroneous' if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. . . ." (Citations omitted.)

The Federated Publications case involved a legal determination of which provision of the Freedom of Information Act applied to the facts presented. It was determined in a "de novo" review that MCL 15.243(1)(s) applied concerning "public records of a law enforcement agency." However, that exemption provision required

a determination for exemption of disclosure whether "the public interest in disclosure outweighs the public interest in non-disclosure in the particular instance." This, of course, is a discretionary review, the determination of which is then reviewed under the "clear error" standard.

This dual standard was also recognized in the case of Local Area Watch v Grand Rapids, 262 Mich App 136 (2004) (appeal to Supreme Court denied) wherein the Court of Appeals stated at p 142, under the heading Standard of Review, the following,

> "We review de novo the trial court's decision to grant or deny summary disposition. . . . The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. . . . This Court also reviews questions of statutory interpretation de novo. . . . Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law, and we review the trial court's factual findings for clear error and review questions of law de novo. . . . We review any discretionary decisions made by the trial court for clear abuse. . . ." (Citations omitted.)

This issue was also addressed in the case of Stone Street Capital, Inc. v Michigan Bureau of State Lottery, 263 Mich App 683 (2004). The case involved a denial of an FOIA request for the identities of individuals who had received lottery winnings. The circuit court entered summary disposition approving the denial.

On appeal the Court of Appeals referred to MCL 15.243(1)(a) of the Freedom of Information Act which exempts from disclosure "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." In reviewing this claimed exemption, the court stated at 686,

> 'Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law, and we review the trial court's factual findings for clear error and review questions of law de novo. . . Our Supreme Court has held that 'the application of exemptions [under the FOIA] requiring legal determinations are reviewed under a de novo standard, while application of exemptions requiring determinations of a discretionary nature ... are reviewed under a clearly erroneous standard'. . . Further, the proper interpretation of a statute is a question of law subject to review de novo . . ." (Citations omitted.)

With respect to the case at bar, amicus curiae submits the case involves both standards of review. As to which exemption section of the Freedom of Information Act applies to the requested document at issue would involve the interpretation of the statute and a de novo review.

Where MCL 15.243(1)(m) involving "communications and notes within a public body or between public bodies of an advisory nature" is determined to apply, the further language of that exemption provision concerning "the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure" requires a discretionary balancing test to support the claimed exemption. Here the review is not de novo but whether the decision is clearly erroneous providing a "firm conviction that a mistake has been made". In this latter situation as stated in Federated Publications, supra, due difference must be afforded the in-camera decision of the trial court in its discretionary balancing of the two interests. The trial court determined de novo that the "frank communication" exemption provision was applicable to the advisory letter of the University's vice president and after its in-camera review of the correspondence, determined in its discretion that permitting such advisory communications to be free of public disclosure outweighed the public interest in

disclosure. It further determined that the communication contained substantially more opinion than fact and the minimal facts included were not severable from the opinion.

2. De Novo review of the application of the Freedom of Information Act in the case at bar could also include exemption (1)(b) of MCL 15.243 pertaining to "investigating records" to the extent that disclosure (ii) deprives a person of a right to a fair trial or impartial administrative adjudication or (iii) constitutes an unwarranted invasion of personal privacy.

As indicated by the Court of Appeals decision of Yarbrough v Department of Corrections, 199 Mich App 180 (1993) the court stated at p185,

> "The law enforcement exemption contained in § 13(1)(b) is not limited in application to police investigations of criminal matters. See *Rural Housing Alliance v. United States Dep't of Agriculture,* 498 F.2d 73 (CA 6, 1974). In *Rural Housing Alliance,* the United States Court of Appeals applied the law enforcement exemption to documents compiled by an agency such as defendant that was not engaged in law enforcement. In this case, the documents sought were prepared during an ongoing investigation into illegal acts, which investigation could possibly result in civil or criminal action. . . Having concluded that the investigation was for law enforcement purposes and that the documents were compiled for those purposes, we hold that the records were exempt from disclosure while the investigation was ongoing."

The Yarbrough case involved a complaint filed with the equal employment opportunity office alleging sexual harassment. The FOIA request was for the "release of all documents relating to the investigation" which was denied with the denial upheld by the Court of Appeals. The denial pertained to "internal memoranda between the offices of the Deputy Director of the Bureau of Correctional Facilities, the Assistant Deputy Director of the Bureau of Correctional

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Facilities, and the Warden of the Grass Lake facility." In approving the denial, the court stated at 184:

> "Review of the documents at issue, both disclosed and undisclosed, indicates that the documents were compiled pursuant to an investigation initiated by the filing of a sexual harassment complaint with EEO and for the purpose of enforcing the laws of the State of Michigan which prohibit sexual harassment in the workplace. As such the documents qualify as 'investigating records compiled for law enforcement purposes.'"

Considering the application of this FOIA exemption provision to the case at bar, the University Board of Regents was investigating for law enforcement purposes alleged improper expenditure by the University President and to this end requested the opinion of the University Vice President. It had previously received the facts of the expenditure through the audit of the accounting firm Deloitte. This opinion, which presumably was of an accusatory nature, would certainly deprive the president "of the right of a fair trial or impartial administrative adjudication" where it was an opinion as distinguished from facts. It would undoubtedly be inadmissable as opinion evidence in any subsequent trial for misappropriation of funds even though it might influence the Board of Regents. The in-camera review of the correspondence by the trial court and Court of Appeals was appropriate and persuasive that this opinion evidence should accordingly not be publically disclosed. Furthermore, such opinion evidence would be of a public inflammatory nature which by virtue of its public dissemination, would unfairly impair future decisions on the merits through public acceptance of the same and public resulting pressure for conviction.

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B. THE TRIAL COURT DID NOT CLEARLY ERROR IN APPLYING FOIA EXEMPTION 13(1)(M) PERTAINING TO INTERNAL FRANK COMMUNICATIONS OF AN ADVISORY NATURE PRELIMINARY TO A FINAL DETERMINATION BY THE UNIVERSITY BOARD OF REGENTS

Amicus Curiae Michigan Townships Association understands that there is no dispute between the parties that a member of the Board of Regents of the University requested an opinion from the vice president of the university of an advisory nature as part of its review of expenditures by the university president for the construction of his home on campus preliminary to the Board of Regents possible action in the matter. The refusal of the Board of Regents to disclose this opinion letter was because it covered "other than purely factual materials" and the encouragement of such internal frank communication without the threat of publicity and public disclosure, improved deliberations and decision making for the benefit of the public which far outweighed any public interest in its disclosure.

As hereinbefore indicated, which of the exemption provisions from the FOIA required disclosure would appear to be a de novo decision. Certainly the pertinent facts of the case would support the application of the frank communication exemption provision. The correspondence from the vice president fully complies with the objective criteria of MCL 15.243(1)(m). The vice president's correspondence was "of an advisory nature", was preliminary to a final Board of Regents' determination, and covered "other than purely factual materials".

The minimal factual material contained in the correspondence, after an in-camera review, was determined to not be extractable. Furthermore, the Deloitte audit had disclosed from a professional's examination all of the expenditures

incurred on the construction of the president's home which had been disseminated to the public. As stated in the case of Evina v Detroit, 205 Mich App 700 (1994), in upholding the applicability of the subject FOIA exemption at 705:

> "At issue here is whether the report comes within the above- mentioned exemption, M.C.L. § 15.243(1)(n); M.S.A. § 4.1801(13)(1)(n), with respect to communications within or between public bodies of an advisory nature that are other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption is certainly potentially applicable to a report within the prosecutor's office that is evaluative in nature and precedes a determination whether to file criminal charges against a suspect."

In the case of Traverse City Record Eagle v Traverse City Area Public Schools, 184 Mich App 609 (1990), (appeal denied by Supreme Court) the court considered whether the frank communication exemption provision of the FOIA, involved in the case at bar, applied to a tentative collective bargaining agreement communicated between the union and school district rendering it not disclosable. The court affirmed the trial court's findings that it was a communication between entities, was advisory in nature involving the deliberative process and that premature disclosure would have a negative impact on the negotiation process. The Court of Appeals stated at pages 612 and 613,

> "The court's analysis implicitly includes the idea that confidentiality is necessary to maintain frank communication between the union and the school board. Frank communication, in turn, leads to effective negotiation, which the court concluded outweighed the public's right to disclosure."

In the case at bar, the issue of whether "the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure" is the part of the exemption provision which is of a balancing discretionary nature. In this latter situation as previously

indicated, the appellate court's responsibility is to determine whether the previous decision in-camera was clearly in error or clearly an abuse of discretion leaving the appellate court with a firm conviction that a mistake has been made. In making such an analysis, due difference is afforded the lower court's decision. (See Federated Publications, Inc., cited supra.)

Notwithstanding the foregoing position of amicus curiae Michigan Townships Association, if the Supreme Court favors the investigative records exemption provisions of the FOIA found at MCL 15.243(1)(b) hereinbefore referred to as the appropriate exemption section, it can affirm the Court of Appeals correct decision for such different reasons. (See Bradley v Board of Education of Saranac Community Schools, et al, 455 Mich 285 (1997).

C. THE DENIAL OF DISCLOSURE OF THE VICE PRESIDENT'S INTERNAL ADVISORY OPINION CONTAINING MINIMAL INTERWOVEN FACTUAL MATERIAL WAS PROPERLY AFFIRMED FOLLOWING THE IN-CAMERA REVIEW OF THE SAME

The trial court ruled as set forth on page 4 of the subject Court of Appeals decisions,

> "(1) The letter contained substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the comments: Doyle's views concerning the president's involvement with the University house project."

As stated by the court in Herald Company, Inc. v Ann Arbor Public Schools, 224 Mich App 266 (1997), on page 275,

> In addition, the FOIA imposes a duty to segregate, to the extent practicable, exempt material from disclosable nonexempt material." (Citing Hubka v. Pennfield Twp, 197 Mich.App. 117, at 120, which latter opinion also cites MCL 15.244.) (Emphasis added.)

MCL 15.244, after providing for the separation of exempt and non-exempt material in subparagraph (1) provides at subparagraph (2) the following:

> "When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from non-exempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption." (Emphasis added.)

Since, in the case at bar, the trial court reviewed in-camera, the in-house advisory opinion of Vice President Doyle and judicially determined that it contained "substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the comments" which were Doyle's "views concerning the President's involvement", it is logical to assume the separation of the minimum of facts contained in the communication from the undisclosable opinions and views of the vice president were not "practicable". The circuit court's in-camera view was accompanied by the Court of Appeals in-camera review which similarly supported the impracticability of the separation. This impracticability was further supported by the recognition by all parties of the publically disclosed voluminous Deloitte audit report of all of the claimed erroneous expenditures. The minimal intertwined facts in Doyle's letter were obviously inconsequential and mere surplusage. Frequently, facts are so entwined with opinions, that one cannot be separated from the other. Further elaboration of the in-camera views and an explanation of the basis of non-disclosure of the minimal facts contained in the vice president's letter could well rise to the improper disclosure of the exempt material

and the consequent impairment of future internal frank communications and the rights to a future fair trial or impartial administrative adjudication.

In the case at bar, the public's interest in disclosure of the suspected vilifying opinion by the vice president would appear to be one of morbid public curiosity as distinguished from a public interest in "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees", which is the stated purpose of the Freedom of Information Act at MCL 15.231(2).

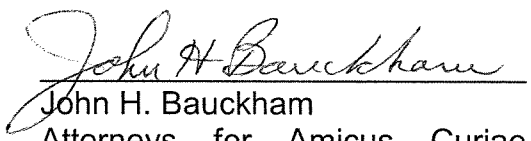
CONCLUSION

Amicus Curiae Michigan Townships Association submits that the Court of Appeals majority decision was well-reasoned and articulated and should be affirmed by this Honorable Court for the benefit of the public though the enhancement of intelligent and thorough deliberations by their governmental representatives preparatory to their official decisions based on disclosed facts as distinguished from staff opinions.

Respectfully submitted.

DATED: September 16, 2005

BAUCKHAM, SPARKS, ROLFE
LOHRSTORFER & THALL P.C.



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